

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

M.G.M. Merchandising Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation
Franchise Tax under Article 9-A of the Tax Law for :
the Years 1970 - 1972.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon M.G.M. Merchandising Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

M.G.M. Merchandising Corp.
c/o Tax Dept.
10202 W. Washington Blvd.
Culver City, CA 90230

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
2nd day of October, 1981.

Carrie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
M.G.M. Merchandising Corp. :

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for Redetermination of a Deficiency or a Revision :
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the Years 1970 - 1972.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Norman Wise the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Norman Wise
Rogers & Wells
200 Park Ave.
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
2nd day of October, 1981.

Connie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 2, 1981

M.G.M. Merchandising Corp.
c/o Tax Dept.
10202 W. Washington Blvd.
Culver City, CA 90230

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

Kathy Pflaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Norman Wise
Rogers & Wells
200 Park Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
M.G.M. MERCHANDISING CORP.
for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Years 1970
through 1972.

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DECISION
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Petitioner, M.G.M. Merchandising Corp., 10202 West Washington Boulevard, Culver City, California 90230, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1970 through 1972 (File No. 11679).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 22, 1980 at 2:10 P.M. Petitioner appeared by Rogers and Wells, Esqs. (Barbara S. Toppeta and Norman Wise, Esqs., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel J. Freund, Esq., of counsel).

ISSUE

Whether petitioner timely filed its Claim for Credit or Refund of Corporation Tax Paid for the fiscal year ended August 31, 1971, based on a carryback to 1969 and 1970 and a carryforward to 1972 of a net operating loss.

FINDINGS OF FACT

1. On May 15, 1975, the Audit Division issued Statements of Audit Adjustment and Notices of Deficiency against petitioner for the tax period ended August 31, 1970 in the amount of \$16,643.35, plus \$12,849.08 in penalty and interest, for

a total due of \$29,492.43. The second said Statement was for the period ended August 31, 1972 in the amount of \$703.41, plus \$5,054.24 in penalty and interest, for a total due of \$5,757.65.

2. On June 15, 1971, petitioner filed its New York State Corporation Franchise Tax Report (short form) for the period ended August 31, 1970, reporting a minimum tax due without showing any other financial data. The report also indicated that petitioner was included on the report of M.G.M., Inc., and subsidiaries.

3. The Audit Division, by letter, dated February 1, 1972, advised petitioner that an audit of the 1970 report of the parent corporation, M.G.M., Inc., did not reflect the results of petitioner's operations on a combined basis with its parent corporation.

4. On December 18, 1974, the Audit Division received an amended New York State Corporation Franchise Tax Report (CT-3) under Article 9-A of the Tax Law for the fiscal years ended August 31, 1970 and August 31, 1971. The 1970 report indicated additional income for fiscal 1970 and claimed as a deduction a net operating loss carryback from fiscal year 1971.

5. The petitioner's fiscal year ended August 31, 1971 and therefore, its due date of the return for the loss year was November 15, 1971. However, petitioner timely filed an Application for Automatic 3-Month Extension for Filing Tax Report thereby extending the time to file until February 15, 1971.

6. Petitioner contended that Net Operating Loss Carryback (NOLD) is a deduction and although a deduction may give rise to a claim for a credit or refund, it is not in itself a claim for a credit or a refund. Therefore, it maintained that section 1087(d) of the Tax Law, which governs a claim for a credit or refund of an overpayment of tax, does not apply to NOLD.

7. On August 21, 1972 resolutions were adopted to dissolve and liquidate M.G.M. Merchandising Corp. as of August 31, 1972.

8. On December 18, 1974, the Audit Division received claims for credit or refund of corporation tax paid (CT-8) claiming a NOLD carryback from the fiscal year ended August 31, 1971 to the fiscal years ended August 31, 1969 and August 31, 1970 and a carryforward to August 31, 1972. A check in the amount of \$9,731.29, dated November 25, 1974, was also received. On December 24, 1974, the said claim was denied as untimely.

9. On September 30, 1975, petitioner filed a petition for redetermination of a deficiency or for refund of tax for the fiscal years ended August 31, 1970 and August 31, 1972.

CONCLUSIONS OF LAW

A. That section 1087(d) of the Tax Law provides in pertinent part:

"Overpayment attributable to net operating loss carry back. - A claim for credit or refund of so much of an overpayment under article nine-a as is attributable to the application to the taxpayer of a net operating loss carry back shall be filed within three years from the time the return was due for the taxable year of the loss..."

B. That the definition of the term "due date" is as follows:

"Time appointed or required for filing a tax return, and in the event of an extension of time to file return, is the date to which period for filing is extended." Black's Law Dictionary 589 (rev. 4th ed. 1968).

C. In numerous sections and sub-sections, the New York State Tax Law uses the phrase "due date" in conjunction with the phrase "as determined without any regard to any extension of time granted to the taxpayer," or a phrase similar thereto. The failure of section 1087(d) of the Tax Law to include such limiting phrase creates an ambiguity.

D. Where a tax statute is ambiguous, the language must be construed in favor of the taxpayer and against the taxing authority (Matter of Grumman Corp.

v. Board of Assessors, 2 N.Y.2d 500, 161 N.Y.S.2d 393 (1957); Metropolitan Convoy Corp. v. City of New York, 2 N.Y.2d 384, 390, 161 N.Y.S.2d 31 (1957) and Matter of Suffolk County Loan v. Bragliani, 5 N.Y.2d 579, 584, 186 N.Y.S.2d 602 (1959).

E. That petitioner filed its claim within the statutory period, as computed by including the extension of time granted to it; therefore, said claim was timely filed (Matter of Park Appliance & Furniture, Inc., State Tax Commission, May 16, 1980; Matter of United Artists Corp., State Tax Commission, November 16, 1979).

F. That the petition of M.G.M. Merchandising Corp. is granted and the Notices of Deficiency issued to it are hereby cancelled.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION


PRÉSIDENT


COMMISSIONER


COMMISSIONER